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Supreme Court, U.S.
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No. [redacted]

In The

SUPREME COURT OF THE UNITED STATES

ROBERT L. JOSEPH,

Petitioner,

v.

SALT LAKE CITY CORPORATION

On Petition For Writ Of Certiorari
To The Utah Supreme Court

PETITION FOR WRIT OF CERTIORARI (No. 1)

Robert L. Joseph
1156 Lost Eden Drive
Sandy, Utah 84094
(801) 571-3098

41 pp

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QUESTIONS PRESENTED

With particularity, the Questions presented are, to wit:

1. Does the civil service commission have the authority to depart from the determinations of the police chief's decision to uphold discipline of an police officer under Utah Law?

2. Did the Salt Lake Civil Service Commission deprive Officer Joseph of a full and fair hearing? Of Due Process?

3. Was it taking unfair advantage of Officer Joseph for the city's attorney to act as both the civil service commission's legal advisor, and as the prosecutor?

4. Was the civil service commission proceeding the product of corruption and misconduct?

5. Does the misconduct allegations raised in this matter warrant a de novo judicial review as part of the separations of powers scheme envisioned by the Founding Fathers?

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INTRODUCTION

Robert L. Joseph, a peace officer, originally petitioned for a judicial review of a suspension order to the Utah Court of Appeals from the dismissal of his appeal by the Salt Lake Civil Service Commission. The commission's duty is to review the police chief's decision to suspend or terminate peace officers providing them a "full and fair hearing to determine the matter."

In this matter, the State of Utah determined that Officer Joseph was justified in his use of deadly force because he exercised such force in self-defense. (App. 14). Contrary to the State's conclusion, the police chief first terminated Mr. Joseph, then adjusted it to a suspension. (App. 7). Even though he was not being terminated, Officer Joseph appealed the chief's decision to the civil service commission because of malice towards Officer Joseph. By State law, the civil service commission is required to either (a) uphold the police chief's decision or (b) overturn it.

However, due to concerted misconduct on the part of the city, the civil service commission upheld the chief's suspension upon other grounds. Ultimately, the decision of the commission violated Utah law, particularly Utah Code Ann. § 10-3-1012 (1953, as amended). The statute conveys the commission limited authority to "fully hear and determine the matter" only; its beyond the discretion of the commission to uphold the police chief's decision upon other grounds as it did.

Ironically, the city's suspension of Officer Joseph was actually for Officer Joseph's approach of the media where he revealed his allegations of **corruption** and **police misconduct**, after his concerns were ignored by the administration. (App. 16). The administration's suspension was retaliatory. (App. 7).

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

Robert L. Joseph (hereinafter "Officer Joseph") respectfully petitions for a writ of certiorari to review the judgment of the Utah Court of Appeals in this case, after the Utah Supreme Court declined to issue a writ of certiorari.

OPINIONS BELOW

The decision of the Utah Supreme Court denying the Petitioner a writ of certiorari to the Utah Court of Appeals and the Utah Court of Appeals' Memorandum Decision are contained in the Appendix at App. 1-6.

JURISDICTION

The final decision of the Utah Supreme Court denying the Petitioner a writ of certiorari to the Utah Court of Appeals was entered on November 14, 2002. (App. 1). The jurisdiction of this Court to review this matter is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional provisions are involved in this case:

The Due Process clause of the Fifth Amendment, which provides, inter alia:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Due Process clause of the Fourteenth Amendment, which provides, in Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The following State statutory provisions are involved in this case:

Utah Code Ann. § 10-3-1012 (1953, as amended). See Page 6, infra.

Utah Code Ann. § 76-2-404 (1953, as amended). See Page 11, infra.

STATEMENT OF THE CASE

I. Nature of the Case:

On March 26, 1999, a fleeing felon forced Officer Joseph (who while acting in his capacity as a Salt Lake Police Officer) to

use deadly force upon him, when he ran-down Officer Joseph in his motor vehicle as he attempted to flee for outstanding felony drug warrants. (App. 14, 19). The felon later breath-tested a .237 BAC. In the incident, Officer Joseph sustained injuries when he was struck by the car, scooped up by the driver's open car door, and then thrown to the ground when the suspect slammed on his brakes. (App. 15). During the event, Officer Joseph discharged 11 rounds into the vehicle, twice striking the suspect. However, he did not empty his service pistol. Each shot was determined to be within State Law and the policies established by Peace Officer Standards & Training ("POST")–the agency charged with training law enforcement officers in the State of Utah. (App. 15).

Three days after the shooting, the State Crime Lab was the first agency to rule in Officer Joseph's favor concluding he was "justified" in his use of deadly force. In spite of that determination, the city pushed the district attorney's office to file charges against Officer Joseph for aggravated assault–an act that is highly irregular against one of its own. (App. 18). In the city's presentation of the case to the district attorney, officials deliberately withheld critical relevant and reliable facts to suggest probable cause against Joseph existed when it did not. (App. 18, 19).[1] A few months later though, once the truth was revealed to the district attorney's Ernie Jones, he recommended discontinuing pursuit of prosecution declaring that Officer Joseph acted reasonable under the circumstances he was confronted.[2]

---

1 Appendix 18 is the Probable Cause statement originally drafter by fellow officer Mark Scharman against the driver who placed Officer Joseph's life in peril. That probable cause statement was withheld from prosecutors.

Appendix 19 is the first draft of the Probable Cause statement against Officer Joseph withheld the self-defense language redacted by the author.

2 See, e.g., *Tennessee v. Garner*, 105 S. Ct. 1694 (1985) (The use of deadly force, apprehension by use of

The D.A. allegedly based its decision on the State Crime Lab report, which the city had purposefully withheld initially. Meanwhile, contrary to the findings of both the State Crime Lab and the district attorney's office, the city insisted on taking administrative action against Officer Joseph any how, since criminal prosecution failed. At the advice of the city attorney's office, the chief reversed Officer Joseph's former termination and modified it to a 20-day suspension. (App. 7). He also issued an ultimatum mandating Officer Joseph to undergoing a second fitness for duty examination with one of its own doctors.[3]

II. Course of the Proceedings:

The police chief delivered Officer Joseph the modified 20-day suspension letter on January 3, 2000. (App. 7). Because the suspension was "posturing by the city's attorneys"[4] rather than for disciplinary reasons for otherwise unjustified conduct, Officer Joseph appealed the suspension on January 7, 2000, to the civil service commission in spite of the chief's warning January 5th

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deadly force, and reasonableness of its use) Graham v. Connor, 109 S. Ct. 186 (1989) (Seizure under the Fourth Amendment–The reasonableness of the use of deadly force must be judged from the perspective of a reasonable officer at the scene and not with 20/20 vision of hindsight).

3 In a taped meeting, the chief informed Officer Joseph that the decision to alter his discipline and send him for the evaluation was posturing by city attorney against Officer Joseph's claimed civil rights lawsuit. The chief warned Officer Joseph not to pursue his appeal to civil service, and the chief assured Officer Joseph that if he dropped the matter, he would protect Officer Joseph's career with the department.

4 As explained in a January 5, 2000 tape-recorded conversation between Officer Joseph and the chief, the urged Officer Joseph to drop his civil rights complaint.

warning. A two-day hearing was conducted, one on April 11, 2000 and the other on May 8, 2000 before the civil service commission. The conclusion of the civil service commission was issued December 6, 2000. (App. 9).

III. Disposition in Trial Court:

Contrary to the clear weight of the evidence, the civil service commission upheld the suspension relying on different grounds–using the city attorney as its legal advisor against Joseph throughout the proceedings. As part of its conclusions, the civil service commission upheld the 20-day suspension claiming Officer Joseph acted out of policy for shooting at a moving vehicle–a separate policy even though closely related to the deadly force policy. (Compare Appendix 20 and 21).

REASON FOR GRANTING THE PETITION

Certiorari Should Be Granted In This Case To Correct the Decisions Rendered Which Have Departed From The Clearly Established Precedence For The State Of Utah Concerning Police Conduct, And Appeals And Procedures In Light Of Fundamental Due Process And Fairness.

A. Introduction.

The statutes relevant to this Petition that Petitioner believes the Utah Court's have overlooked or misapprehended are as follows:

> ***10-3-1012. Suspension or discharge by department head - Appeal to commission - Hearing and decision.***
>
> (1) All persons in the classified civil service may be suspended as provided in Section 10-3-912, or removed

from office or employment by the head of the department for misconduct, incompetency, failure to perform duties, or failure to observe properly the rules of the department, but subject to appeal by the suspended or discharged person to the civil service commission.

(2) Any person suspended or discharged may, within five days from the issuance by the head of the department of the order of suspension or discharge, appeal to the civil service commission, which shall fully hear and determine the matter.

(3) The suspended or discharged person shall be entitled to appear in person and to have counsel and a public hearing.

(4) The finding and decision of the civil service commission upon the hearing shall be certified to the head of the department from whose order the appeal is taken, and shall be final and immediately enforced by the head.

Utah Code Ann. § 10-3-1012 (1999). (Emphasis added).

10-3-1012.5. Appeal to court of appeals - Scope of review.

Any final action or order of the commission may be appealed to the Court of Appeals for review. The notice of appeal must be filed within 30 days of the issuance of the final action or order of the commission. The review by Court of Appeals shall be on the record of the commission and shall be for the purpose of determining if the commission has abused its discretion or exceeded its authority.

Utah Code Ann. § 10-3-1012.5 (1999). (emphasis added).

In interpreting and applying either of these statutes the

Courts should have followed its own long-standing policy. The Utah Supreme Court policy for construing statutory construction has recently been reiterated in *Lyon v. Burton*, 5 P.3d 616 (Utah 2000). The court stated, "[W]here the statutory language is plain and unambiguous, we do not look beyond the language's plain meaning to divine legislative intent." *Id.* (quoting, *Horton v. Royal Order of the Sun*, 821 P.2d 1167, 1168 (Utah 1991). It is clear in reading either Section 10-3-1012 or 10-3-1012.5, there is nothing ambiguous about their language. Its quite clear and yet neither court addressed Officer Joseph's appeal in light of the statutes. Either court should have reversed the decision of the civil service. All one has to do is compare the commissions's December 16, 2000 findings and conclusions (App. 9) to the chief's January 3, 2000 suspension letter (App. 7) to see the obvious disregard for Section 10-3-1012.

B. The Commission Failed To Follow Utah Code Ann. § 10-3-1012 (1953, as amended): (1) The Commission Was Unfairly Prejudiced By City Attorney Misconduct And Its Undue Influence; and (2) The Commission Exceeded It Limited Authority Of Review –The Commission May Not Depart From The Decision To Uphold On Other Grounds.

Pursuant to Utah Code Ann. § 10-3-1012 (1953, as amended), the civil service commission is without broad discretion; the power conferred upon the commission to "fully hear and determine the matter" gives the commission the authority to determine whether the suspension of a police officer by the chief is appropriate for the alleged conduct of the officer. Any deviation of this scheme is beyond the authority of the commission constituting an abuse of discretion. Controlling authority over the case at hand, the Utah Supreme Court has held that substitution of a suspension for six months without pay, in lieu of dismissal, is beyond the power of the commission. *Vetterli v. Civil Serv. Comm'n*, 106 Utah 83, 145 P.2d 792 (1944). Comparatively, the commission in this matter likewise acted

beyond its authority, it cannot draw conclusions different than that of the chief. Nevertheless, in this case the commission did depart from the basis of the chief's decision when it looked for any basis to upheld the decision.

In this matter, when the case was presented to the Utah Court of Appeals, Officer Joseph argued two central points: (1) the decision of the commission exceeded the scope of its authority when it upheld the chief's decision beyond the reasoning expressed previously by the police chief; and (2) Officer Joseph claimed that the commission failed its duty to allow him a *fair and impartial hearing* because of the city attorney's conduct throughout the proceedings (where Ms. Stonebrook acted as both prosecutor for the city and as the commissioner's legal advisor). Frequently in the proceeding, Ms. Stonebrook was called upon to interpret the law and its application for the commission, both in regards to procedures and as to the admissibility of evidence. Many of Officer Joseph's attempts to introduce evidence resulted in objections being sustained.

Naturally, it came as no surprise being the Salt Lake Civil Service Commission that it ruled in favor of the city. Rather than concluding in Officer Joseph's favor on the deadly force question as one would expect, the commission ruled that Officer Joseph violated other policies for which were never noticed by the chief. (App. 12). The failure to provide Officer Joseph of reasonable notice is on its face a violation of Due Process. By law, Officer Joseph is entitled to fair and adequate notice as a requirement of Due Process.[5]

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5 *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950))("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise (sic) interested parties of the pendency of the action and afford them an opportunity to present their objections."); *also Nelson v. Jacobsen*, 669

Meanwhile, in the Utah Court of Appeals' decision, the court avoided ruling in favor of Officer Joseph claiming his failure to marshal the evidence on some of his issues and that he failed to preserve others on the record before the commissioner.[6] (App. 2-6). It was fundamentally plain error for the city attorney to act in a dual capacity during a formal proceeding where a de novo trial judicial review is not an available remedy. Such plain error violates the principles of free government and violated Officer Joseph's privilege to Due Process, the Law of the Land.

Nevertheless, the Utah courts also apparently overlooked or misapprehended Utah Code Ann. § 10-3-1012's plain language in rendering their decision–the statute plainly limits the commission's authority to conducting a full hearing only. It may not alter or deviate from explained the chief's initial determinations. As a civil service employee, a police officer is entitled to Due Process under both the federal constitution and this section, by way of oral or written notice of the charges, an explanation of the employer's evidence, an opportunity to respond to the charges in "something less" than a full evidentiary hearing before termination, coupled with a full post-termination hearing "at a meaningful time." *Lucas v. Murray City Civil Serv. Comm'n*, 949 P.2d 746 (Utah Ct. App. 1997). In other words, the commission may only uphold the chief or overrule him, and any departure from this scheme would deprive the officer of Due Process for failure to provide him with an opportunity to prepare and defend the accusations in a timely and meaningful manner. *Id.* In this matter, the scheme was not followed in the case of Officer Joseph.

In this matter, the police chief suspended Officer Joseph allegedly for acting beyond the scope of the city's deadly force

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P.2d 1207 (Utah 1983).

6 Failing to recognize the *Plain Error* of it.

policy. (App. 7).[7] This Court in *Tennessee v. Garner*, 105 S. Ct. 1694 (1985) addressed the issue concerning use of deadly force, apprehension by use of deadly force, and reasonableness of its use. This Court also held that the reasonableness of the use of deadly force must be judged from the perspective of a reasonable officer at the scene and not with 20/20 vision of hindsight in *Graham v. Connor*, 109 S. Ct. 186 (1989). Officer Joseph's actions survived scrutiny under these cases. The chief, rather than accepting that, he suspended Officer Joseph under the advice of the city attorney's who were posturing. On appeal to the Civil Service Commission, the commission deviated from the suspension on those grounds upon a finding of unprofessional conduct, for firing at or from a moving vehicle. (App. 12). Those findings were derived under the control of the city attorney as well. The end-result is that the commission was led to abuse its statutory discretion. *Cf. Vetterli*, supra.

Because of the commission's violation, pursuant to Utah Code Ann. § 10-3-1012.5 (1953, as amended), upon a review of the record, this Court should have ruled that the commission "abused its discretion or exceeded its authority." Section 10-3-1012.5 is so clear on its face that it could only lead one to believe that the Utah Court of Appeals overlooked or misapprehended the law. Certainly, the city could not present any other policy to the commission for its consideration whether the chief determined correctly unless it departed from the well-defined statutory scheme. Clearly the commission knew or reasonably should have known that it was exceeding its clearly established authority by entertaining other policies the city presented.

So it is incumbent upon this Court to restore justice, to correct the commission's understanding of its role, the aggrieved's rights to redress injuries and fundamental fairness.

Nevertheless, regardless of the commissioner's misapprehensions of the law and concerning the principles of self-

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7 Deadly Force Policy 3-06-02.00. (App. 20).

defense, **the shooting was justified**.[8] "A rose by any other name is still a rose." Regardless of the proceeding or the differing burdens of proof associated–the justification for the use of deadly force is an available affirmative defense barring prosecution. However, Officer Joseph's valid defense has been meaningless to diminish the city's drive to exact revenge for Officer Joseph's Press statements. (App. 16). Each shot fired was evaluated and considered by the State Crime Lab–and it is clear that Officer Joseph acted in self-defense. (App. 15). As a matter of fact, the evidence shows that once the situation was no longer hostile for Officer Joseph, he ceased firing. *Id.*

Officer Joseph is to be held to the same standard as any other law enforcement officer has been or should be when involved in deadly force encounter. (App. 14, 20). The standard is codified under Utah Code Ann. 76-2-404 (1953, as amended). Section 76-2-404 reads:

> (1) A peace officer, or any person acting by his command in his aid and assistance, is justified in using deadly force when:
>
> (a) the officer is acting in obedience to and in accordance with the judgment of a competent court in executing a penalty of death;
>
> (b) effecting an arrest or preventing an escape from custody following an arrest, where the officer reasonably believes that deadly force is necessary to prevent the arrest from being defeated by escape; and
>
> (i) the officer has probable cause to believe that the suspect has committed a felony offense involving the infliction or threatened infliction of death or serious bodily injury; or
>
> (ii) the officer has probable cause to believe the

---

8 The Legislature intended Section 10-3-1012 to be a ***shield*** for aggrieved officers and not intended to be used as a ***sword*** against the officer by the city.

suspect poses a threat of death or serious bodily injury to the officer or to others if apprehension is delayed;

(c) the officer reasonably believes that the use of deadly force is necessary to prevent death or serious bodily injury to the officer or another person.

(2) If feasible, a verbal warning should be given by the officer prior to any use of deadly force under Subsection (1)(b) or (1)(c).

Id., (App. 14).

Under the foregoing provision, Officer Joseph was determined "justified" in the use of deadly force by the D.A., by the State Crime Lab, and by POST for he acted in clear self-defense. (App. 15). Only the city has refused and continues to reject a "justified" determination for reasons only it can appreciate.

Officer Joseph reported the allegation of city corruption and police misconduct to the Press at his press conference, when the D.A. dismissed the criminal charges against Officer Joseph. (App. 16). Officer Joseph was clearly within his First Amendment right to approach to the Press with his concerns when the concerns were unanswered within the administration. Other than the public, there is no police for the police. Officer Joseph received no assistance from the department, they even refused to reimburse him for his legal expenses regarding the baseless prosecution officials' attempted to pursue, contrary to state law. Rather than dropping the whole matter itself, the city attorney's attempted to posture the city to suspend and terminate Officer Joseph in what was to appear a legitimate termination.

Because of the city's control over the civil service, and because the record was under the direction of the city, the proceedings were not conducted fairly and the record of proceedings was not fairly preserved conveying an appearance of impropriety and a conflict of interest. The opportunity to obtain justice in this matter was never genuine and the integrity of the

proceeding has always remained suspect–on January 5, 2000, the police chief hinted to Officer Joseph not to appeal the matter to civil service. At the time, Officer Joseph did not know what the chief meant. Because of the appearance of an impropriety, it can be said here that Due Process protection was never to anticipated to be afforded to Officer Joseph in the civil service commission proceedings. Nevertheless, as the matter was presented to the Utah Court of Appeals for a review of the record, and then attempted before the Utah Supreme Court, due to the requirements of those courts for appellants to preserve objections in the record, Officer Joseph's appealable issues were rejected by those courts. Thus, not only was Officer Joseph deprived of a fair and meaningful proceeding, he was deprived of a fair and meaningful appeal. That is until now.

This Court is the Highest Court of the land–it is both a court of law and a court of equity. It has the authority to deliver justice in this matter concerning this appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert L. Joseph
Petitioner Pro Se

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Robert L. Joseph, Petitioner,	)	No. 20020752-SC
	)	20001111-CA
v.	)	
Salt Lake City Civil Service Commission, Salt Lake City Corporation, Salt Lake City Police Department, and the Chief of Police, Respondents.	)	

- - - - -

ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed pursuant to Rule 48, of the Utah Rules Appellant Procedure.

IT IS HEREBY ORDERED that the Petition for Writ of Certiorari filed on September 23, 2002, by petitioner is denied.

FOR THE COURT:

November 14, 2002

s/
Christine Durham
Chief Justice

IN THE UTAH COURT OF APPEALS

- - - oo0oo - - -

Robert L. Joseph,	)	MEMORANDUM
	)	DECISION
Petitioner,	)	(Not For Official Publication)
	)	
v.	)	Case No. 20001111-CA
	)	
	)	FILED
Salt Lake City Civil Service	)	(July 26, 2002)
Commission, and Salt Lake	)	
City Corporation, Police	)	2002 UT App 250
Department,	)	
	)	
Respondents.	)	
	)	

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Original Proceeding in this Court

Attorneys: Robert L. Joseph, Sandy, Petitioner Pro Se

Martha S. Stonebrook, Salt Lake City, for Respondents

- - - - -

Before Judges Billings, Greenwood, and Thorne.

THORNE, Judge:

Robert L. Joseph appeals from a finding of the Salt Lake City Civil Service Commission (the Commission) affirming the Salt Lake City Police Department's (the Department) conclusion that Joseph acted unprofessionally and violated the

Department's deadly force policy. We affirm. 1

First, absent a demonstration of plain error or exceptional circumstance, we will not review claims that an appellant failed to first raise in the trial court. See State v. Holgate, 2000 UT 74, ¶ 11, 10 P.3d 346; State v. Brown, 948 P.2d 337, 343 (Utah 1997) (stating "' [i]f a party through counsel has made a conscious decision to refrain from objecting or has led the trial court into error, we will then decline to save that party from the error'" (citation omitted)). Therefore, we do not address Joseph's arguments concerning the following issues: (1) The Commission's decision to exclude evidence concerning statements made during settlement negotiations between Joseph and the Department; (2) the Commission's actions concerning Joseph's request that the Department produce a crime scene videotape; (3) the admissibility of Darin Bell's transcript testimony; (4) the Commission's decision to exclude two charts from evidence; and (5) the proportionality of Joseph's punishment.

Joseph next argues that the evidence presented was insufficient to support the Commission's finding. To successfully challenge a factual finding, an appellant must first marshal the evidence supporting the finding. See Moon v. Moon, 1999 UT App 12, ¶ 24, 973 P.2d 431. Only then is he permitted to attempt to demonstrate why the finding is clearly erroneous. See id. "When an appellant fails to meet the heavy burden of marshaling the evidence, we assume [] that the record supports the findings of the trial court ..." Id. (Citations and quotations omitted) (alteration in original). Here, Joseph does nothing more than reargue the evidence he relied upon before

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1. During the pendency of this appeal, Joseph filed a fourteen page motion, wherein he requested relief from the Commission's judgement. Because we conclude that the Commission did not abuse its discretion, we find Joseph's motion to be without merit.

the Commission. Accordingly, because Joseph has failed to properly marshal the evidence, we conclude that the evidence was sufficient to support the Commission's findings that Joseph violated the Department's deadly force policy and that his use of deadly was unjustified. 2

Moreover, we review the Commission's findings only to determine whether the Commission "abused its discretion or exceeded its authority." Utah Code Ann. § 10-3-1012.5 (1999). After reviewing the record, we conclude that the Commission had ample evidence available to support its findings, including the following facts: (1) Joseph fired at least twice at the vehicle as it was moving away from him and was no longer a threat to either Joseph or any possible bystanders; and (2) Joseph could not clearly see either the car or his surroundings as he was firing his weapon.

Third, while Joseph couches his fourth argument as a challenge to the Commission's admission into evidence statements that Joseph identifies as hearsay, the actual thrust of his argument is a challenge to the credibility of the witnesses. However, the Commission, as a local administrative body, is not strictly bound by the formal rules of evidence. See Lucas v. Murray City Civil Serv. Comm'n, 949 P.2d 746, 755 (Utah Ct. App. 1997). So long as the evidence admitted by the Commission was legally relevant and the Commission provided Joseph an opportunity to introduce evidence of his own, as well as the opportunity to cross-examine the City's witnesses and challenge their credibility, we will conclude that the Commission acted within the scope of their authority. See id. At 756. Moreover, we defer to the initial decision maker in assessments of credibility and evaluations of evidence. See Drake v. Industrial Comm'n, 939 P.2d 177, 181 (Utah 1997).

---

2. Joseph also argues that the Commission violated its own rules concerning burdens of proof and proceeding; however, the thrust of this argument is that the evidence was not sufficient to support the Commission's finding. Accordingly, Joseph is

Having reviewed the record, we conclude that the Commission did not err in admitting into evidence the testimony challenged by Joseph on appeal. 3 The testimony was clearly relevant to the Commission's determinations, and the Commission gave Joseph the opportunity to present his own counter witnesses and to cross-examine the Department's witnesses. Additionally, the record clearly shows that the commission examined all of the evidence placed before it prior to making its determination. Therefore, we conclude that the Commission's decision was well within its discretionary bounds.

Finally, because Joseph's remaining issues are without merit, we do not address these claims. Rather, we explain why each issue is without merit. See State v. Carter, 776 P.2d 886, 888-89 (Utah 1989).

First, the Commission ruled in favor of Joseph and excluded the written by Assistant District Attorney Richard Shepard. Therefore, the letter was never introduced as evidence during the hearing. Second, the commission enforced Joseph subpoena, ordering the Department to comply. Third, the Commission admitted into evidence documents concerning two previous unrelated shootings, and there is nothing in the record to indicate that the Commission failed to review these documents prior to concluding that Joseph acted out of policy. Fourth, there is nothing to support Joseph's contention that the Commission denied him the opportunity to introduce evidence

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required to first marshal all of the evidence supporting the finding, and only then is he permitted the opportunity to demonstrate that the evidence is insufficient to support the finding. See Brewer v. Denver & Rio Grande W.R.R., 2001 UT 77, ¶ 33, 31 P.3d 557. Because Joseph failed to properly marshal the evidence with respect to this claim, we assume the Commission's findings are correct.

3. We can see nothing to suggest that Joseph objected to the testimony during the hearing. However, rather that disposing of

of the Department's bias, intent, or retaliatory motive regarding its determination that Joseph acted out of policy. Finally, the record does not support Joseph's allegations that the Commission allowed the Department to modify Chief Connole's original decision to include a finding of unprofessional conduct.

Accordingly, we affirm the Commission's decision.

s/
William A. Thorne Jr., Judge

WE CONCUR:

s/
Judith M. Billings,
Associate Presiding Judge

s/
Pamela T. Greenwood, Judge

---

this argument on preservation grounds, see State v. Holgate, 2000 UT 74 ¶11, 10 P.3d 346, we address it on the merits.

SALT LAKE CITY CORPORATION
POLICE DEPARTMENT

3 JANUARY 2000

Robert Joseph
1156 East Lost Eden Drive
Sandy, Utah 84094

Re: Reinstatement

Dear Officer Joseph,

On 16 July 1999 you were released from your employment with Salt Lake City Corporation. Chief Ruben Ortega terminated your employment because he concluded that on 26 March 1999 you violated the Police Department deadly use of force policy, coupled with aggravating and mitigating information from your work history.

Subsequent to your release from employment you appealed your discipline with the Salt Lake City Civil Service Commission. I have reviewed all matters known to me relevant to your release from employment. After reviewing these matters I am amending the City's decision in the following manner.

I find that your use of deadly force in conjunction with IA Case 99-002-s was not in policy. However, I find that appropriate discipline under the circumstances should be twenty-(20) days suspension without pay in stead of termination.

As a result of this modification you are hereby reinstated by the city effective this date. You will receive backpay, appropriate pension contribution, and other employment benefits, if any, for the period from 16 July 1999 until this date less the twenty-day suspension.

Upon your return I direct that you submit for a fitness for duty evaluation. You will be notified of the date and time of that evaluation by separate correspondence.

I have also directed your Division commander to arrange for an appropriate debriefing of the incident of 26 March 1999, along with additional training, including appropriate additional field officer training. Please participate constructively in the incident briefing and in the additional training offered by your Division Commander. You will be expected to conform your conduct to the training you receive as a Police Officer.

Please immediately contact Captain Scott Folsom, your Division Commander, who will arrange for your return to work. Captain Folsom can be reached at 575-3111.

I wish you well upon your return.

Respectfully,

s/
Mac Connole
Chief of Police

Copy to:
Personnel file
Division commander
Lyn Creswell

IN THE CIVIL SERVICE COMMISSION IN AND FOR SALT LAKE CITY, UTAH

Robert L. Joseph,	*	
	*	
Petitioner,	*	Findings of Fact, Conclusions
	*	and ORDER
v.	*	
	*	
Salt Lake City Corporation,	*	
	*	
Respondent	*	

On April 11, 2000 and May 8, 2000, this matter came before the Civil Service Commission. Petitioner Robert ("Joseph") was present and represented by his counsel, J. Bruce Reading. Salt Lake City Corporation was represented by its counsel, Assistant City Attorney Martha S. Stonebrook.

FINDINGS OF FACT

1. The incident which gave rise to the disciplinary action taken against Officer Robert Joseph ("Joseph") occurred on March 26, 1999 at approximately 1:00 a.m.

2. The location of the incident was approximately 2300 South 700 East in Salt Lake City, Utah.

3. Joseph was off-duty on that date, working a part-time job.

4. Joseph was wearing his police uniform and was driving a police vehicle.

5. Joseph was called away from his part-time job to meet his wife at 9th South and 7th East.

6. A car driven by Westley Scott ("Scott") passed Joseph going at a high rate of speed.

7. Joseph's wife asked him several times if he was going to follow the car.

8. Initially Joseph declined to follow Scott's car.

9. Eventually, Joseph decided to follow Scott's vehicle.

10. Joseph caught up with Scott's vehicle near 2100 South.

11. Joseph turned on overhead lights at approximately 2200 South.

12. Scott pulled his vehicle to the side of the road but continued to creep forward.

13. Joseph pulled his vehicle in front of Scott's car at an angle.

14. Joseph did not call dispatch when he initiated the traffic stop.

15. When both cars were stopped, Joseph saw Scott waving his arms around.

16. Joseph exited his vehicle and drew his gun.

18. Joseph approached Scott's car on the driver's side.

19. Joseph was telling Scott to roll down the window and, when Scott did not respond, Joseph opened the driver's side door.

20. Scott put the car into reverse and began backing up.

21. Joseph pulled himself up on the running board of Scott's vehicle.

22. Scott stopped the car suddenly, causing Joseph to fall from the vehicle. Scott then accelerated and fled from the scene.

23. During the incident, Joseph fired eleven rounds, two of which hit Scott (one in the cheek and one in the foot).

24. Joseph fired at least two shots at Scott's vehicle as the vehicle was moving away from him.

25. One eyewitness, John Childress, heard a car accelerating and then heard several shots.

26. Another eyewitness, Darin Bell, looked out his window and saw Joseph standing in a shooting stance, heard some shots but saw no vehicle.

27. Joseph shot at Scott's vehicle despite the fact that his vision was blurred and he was unsure of his target.

28. Scott drove to the home of his girlfriend where he was arrested and taken to St. Marks Hospital.

29. After Scott had left the scene, Joseph called dispatch.

30. Scott's vehicle was impounded on March 26, 1999 and taken to the City impound lot.

31. On March 31, 1999, the car driven by Scott on the night of the incident was released to the owner of the vehicle, who was not involved in the incident.

32. Scott was arrested on March 26, 1999 and booked into the Salt Lake County Jail on charges of aggravated assault on a police officer and felony traffic fleeing.

33. Joseph was placed on administrative leave on march 26, 1999.

34. On March 29, 1999, Joseph was suspended pending the investigation of the incident.

35. Both Internal Affairs and the Homicide Unit of the Salt Lake City Police Department investigated the march 26, 1999 incident.

36. The salt lake County District Attorney's Office filed an Information in the Third District Court on April 19, 1999 charging Joseph with aggravated assault on Scott, a second degree felony.

37. A Warrant for Joseph's arrest was issued on April 19, 1999 and Joseph was arrested and booked into the Salt Lake County Jail.

38. On July 16, 1999, then Chief Ruben Ortega terminated Joseph's employment with Salt Lake City Corporation, finding that Joseph had used deadly force after any potential threat to him had passed and had violated the policy against firing at or firm a moving vehicle.

39. On November 23, 1999, the criminal charge against Joseph was dismissed.

40. On January 3, 2000, Acting Chief of Police A.M. Connole reviewed Joseph's termination and amended the decision, finding Joseph's use of deadly force was not in policy and imposed a twenty day suspension.

41. Joseph was reinstated effective on January 3, 2000 and received his back pay from July 16, 1999 to January 3, 2000, less the twenty days.

42. Joseph stipulated that the 20 day suspension was not disproportionate to the charge that he violated police policies and only contested Chief Connole's finding that Joseph's actions were in violation of police policies.

CONCLUSIONS

1. Joseph engaged in unprofessional conduct that put himself in a position of danger.

2. Joseph used deadly force after all threat to him had passed.

3. Joseph shot at Scott's vehicle as it was moving away from him.

4. Joseph violated Police Policy 3-06-02.00 (Deadly Force).

5. Joseph violated Police Policy 3-06-05.02 (Firing at or from a Moving Vehicle).

ORDER

After hearing all of the evidence presented by both sides, and for good cause shown, it is the unanimous decision of the Civil Service Commission to uphold the finding by Chief A.M. Connole that Joseph's actions violated police policies. Because Joseph stipulated that the 20 days suspension was not disproportionate if he was found to be out of policy, the imposition of that discipline is also upheld.

Therefore, it is hereby ordered that the finding that Joseph violated policies 3-06-02.00 and 3-06-05.02 is sustained.

DATED THIS 19 DAY OF JULY, 2000.

BY THE COMMISSION:

s/
Commissioner John E. Robertson
Chairperson of and for the Civil
Service Commission

OFFICE OF
DISTRICT ATTORNEY
FOR SALT LAKE COUNTY

DAVID E. YOCOM
DISTRICT ATTORNEY

JERRY G. CAMPBELL
CHIEF DEPUTY

JUSTICE DIVISION
MAIN OFFICE

RICHARD S. SHEPHERD
DIVISION DIRECTOR

MEMORANDUM

TO: DAVID E. YOCOM
FROM: ERNIE W. JONES
DATE: NOVEMBER 18, 1999
RE: PRESS RELEASE OFFICER ROBERT JOSEPH

The Salt Lake District Attorney has concluded that Salt Lake Police Officer Robert Joseph may have been legally justified in firing 11 shots from his pistol at Westley Scott. Based on the review of the evidence the District Attorney will move to dismiss Aggravated Assault charges currently pending against Officer Joseph. There is not sufficient evidence to prove beyond a reasonable doubt that Officer Joseph is guilty of Aggravated Assault.

Under the provisions of 76-2-402 UCA a peace officer is justified in using deadly force when:

1) the officer reasonably believes that the use of deadly force is necessary to prevent death or serious bodily injury to the officer or another person or

2) Effecting an arrest, where the officer reasonably believes that deadly force is necessary to prevent an escape.

The evidence shows that Westley Scott put his vehicle in reverse and almost backed over Officer Joseph. the officer believed his life was in danger while hanging on to the car after being scooped by Mr. Scott. Westley Scott told officers at the hospital that he hoped the officer was ok and that he did not mean to hurt the officer. Westley Scott attempted to flee after the officer directed him to stop the vehicle. Mr. Scott fled from the scene because there was an out standing warrant for his arrest on drug charges.

Tests completed by the State Crime Lab show the angle of the shots fired into Mr. Scotts vehicle was from "low to high." This analysis suggests that shots were fired while the officer was on the ground and in danger of being run over by the vehicle. While the injuries to Westley Scott were serious it appears that Mr. Scott created the situation which caused these injuries.

Officer Joseph was just justified in shooting Westley Scott because of the threat of being run over or injured by Mr. Scott's vehicle.

Also Officer Joseph was justified in using deadly force to effect the arrest and prevent the escape of Mr. Scott after the assault was committed.

The State believes there is insufficient evidence to suggest the officer acted in a criminal manner.
Self defense was a valid claim in this case.

Cleared officer blasts department

by Gib Twyman
Deseret News Staff Writer

No sooner did cleared officer Rob Joseph bounce off the ropes from excessive-force charges than he came out swinging Wednesday against Salt Lake Police Department superiors.

"I can only say that the police administration misled the public, misled the courts, tampered with evidence, tampered with witnesses and obstructed justice," Joseph,38, said in an emotional press conference Wednesday at the offices of defense attorney Loni F. DeLand.

"Today I publicly call for an FBI investigation and for the attorney general to look at the way this case was handled," said Joseph, a two-year Salt Lake police officer, relieved of his duties after firing 11 shots and injuring a fleeing Westley Scott, 21, Holladay, after a traffic stop March 26 near 2300 S. 700 East.

Third District Judge Michael K. Burton granted a defense motion Tuesday to dismiss charges of aggravated assault, a second-degree felony, against Joseph.

It was the second high-profile court case this week exonerating an officer accused of using excessive force. On Monday Salt Lake officer Lane Heaps was acquitted by a jury of misdemeanor assault in connection with another traffic stop.

Salt Lake Police Chief Ruben Ortega issued a statement staunchly denying mishandling in either case.

"The factors that led to their termination have not changed,"Ortega said. "Their firings were appropriate in the interest of public safety and in the preservation of the integrity of the police department.

"In the interest of fairness, no further comments should be made concerning these cases since their terminations have been appealed, and we intend to defend the terminations at the time of the Civil Service (Commission) hearings. The filings of criminal charges against Rob Joseph and Lane Heaps were at the sole discretion of the Salt Lake District Attorney's Office."

Deputy district attorney Ernie Jones said there wasn't

enough evidence to demonstrate Joseph violated the Utah Criminal Code's deadly force statute.

The statute states an officer can use deadly force if he fears being killed, incurring bodily harm or to prevent a suspect from fleeing.

"After the crime lab's findings it became obvious the use of deadly force was justified," Jones said. "But I take issue with any notion of blaming law enforcement for these charges. The police took three weeks to investigate the case, and I think they did a good job. Even if you think the investigation was sloppy or bad, to say there was some kind of conspiracy is just wrong."

DeLand said the information investigators gathered in the case was "erroneous and incompetent."

"They got stuck with it and realized it wasn't going to fly," DeLand said.

There were two key questions in the case. One, whether Joseph fired from the ground after Scott gunned his car in reverse, trying to shake the officer off the car. Two, whether Joseph hopped the car rail, clinging to the roof with his gun hand as the driver's side door swung at him.

"The detailed crime lab work made it obvious he was not standing. All the lines of fire were low to high," Jones said. "And marks along the top of the car showed his gun had dragged the roof of the car. Clearly he was hanging on to prevent a threat to his life."

"I felt like I'd been in a bullfight and lost." Joseph said. "I guess I was in a fight with a rather large, deadly weapon. I did what I could to protect my life while trying to protect the public from a drunk and speeding driver." -[Deseret News November 24, 1999].

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P.C. Statement

Affiants, Assistant Chief Investigator Steve Bartlett of the District Attorney's office and Detective Sergeant Jerry Mendez of the Salt Lake City Police Department base this information on the following:

1) Statement by Δ Joseph that on or about March 26th, 1999 at about 2300 South 700 East he made a traffic offense stop on Mr. Scott while employed as a Salt Lake City Police Officer. During the course of the traffic enforcement stop, Mr. Scott attempted to [~~further~~] flea from Δ Joseph. Scott backed his vehicle as Δ Joseph opened Scott's door. Scott continued to back as Δ Joseph was between the open door and the rail. Δ Joseph was pushed backwards by the Scott vehicle. [Δ Joseph [said [~~he feared for his personal safety and~~ fired his police pistol at Scott in order to get Scott to stop.

PROBABLE CAUSE STATEMENT:

The statements of Salt Lake City Police Officer R. Joseph to Salt Lake Police Detective M. Scharman, that on March 26, 1999, he initiated a traffic Stop at the Location of 2300 South 700 East, in Salt Lake County, Utah, When officer Joseph approached the vehicle the defendant who not respond to verbal commands. Officer Joseph open the driver side door of the defendants vehicle, at which time the defendant put the vehicle into reverse and started the car backwards, scooping Officer Joseph up, and causing him to grab onto the door and top of the car so as not to be run over. Officer Joseph yelled at the defendant to stop, but did not. As Officer Joseph was losing his grip on the car and started to fall off, Officer Joseph fired his service gun at the defendant as he was falling to the roadway. The defendant then drove off forward to evade police contact.

Following the initial confrontation with Officer Joseph, Other Police units were able to locate the defendant driving at a high rate of speed. Officers initiated emergency equipment but the defendant did not respond. A pursuit followed the defendant to his place of residency at which time the defendant was taken into custody. The defendant was then identified as being shot at the time Officer Joseph initial tried to stop the defendant.

The defendant made statement to officers that he did not mean to hurt the officer, just wanted to get away from the police because of past warrants. The medical staff at St. Marks Hospital, stated that the B.A. of the defendant was 2.87

Officer Joseph contact with the defendant showed the defendant in control of the car. And the arresting officers show the defendant in control of the car at the time of arrest.

3-06-02.00 DEADLY FORCE-STATUTORY AUTHORITY

3-06-02.01 Authority to Use Deadly Force

Deadly force may be used only when:

A. The officer reasonably believes that the use of deadly force is necessary to prevent death or serious bodily injury to the officer or another person.

B. The officer is effecting an arrest or preventing an escape from custody, AND

The officer reasonably believes deadly force is needed to prevent the arrest from being defeated by escape; AND (one of the following must be present):

1. The officer has probable cause to believe the suspect has committed a felony offense involving the infliction or threatened infliction of death or serious bodily injury.

2. The officer has probable cause to believe the suspect poses a threat of death or serious bodily injury to the officer or to others if apprehension is delayed.

3-06-05.02 FIRING AT OR FROM A MOVING VEHICLE

Discharging a firearm at a moving vehicle is prohibited.